Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

BERYLE JOHNSTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the prosecution violated the dictates of *Doyle v. Ohio,* by questioning and cross-examining witnesses and the accused on the accused's post-arrest silence?

2. Whether this Court should expand the *Doyle v. Ohio* decision to include within its limitation of cross-examination questioning and prosecutorial comment on the accused's post-arrest silence to cover not only post-*Miranda* time frame but pre-*Miranda*?

3. Whether the prosecution failed to present sufficient evidence showing the accused's predisposition to commit the crimes charged under the requirements of the *Jacobson* decision?

4. Whether the trial court erred in failing to permit the accused to submit extrinsic evidence of facts and circumstances of a prior misdemeanor conviction placed before the jury by the prosecution?

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel on behalf of Petitioner, BERYLE JOHNSTON, hereby certifies that to the best of his knowledge and belief, the following is an accurate listing of all persons and entities with an interest in the outcome of this case.

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OPINION BELOW

On February 13, 1996, the United States Court of Appeals for the Eleventh Circuit Per Curiam Affirmed the conviction of Beryle Johnston. (Appx A.)

On March 5, 1996 Beryle Johnston filed his Suggestion for Rehearing and Rehearing En Banc. On April 24, 1996 the Eleventh Circuit denied that combined petition. (Appx B.)

JURISDICTION

Grounds for invoking the jurisdiction of this Court:

i. The judgment of the United States Court of Appeals for the Eleventh Circuit of which review is now sought, was entered on February 13, 1996 (Appx A.) and the Petition for Rehearing, and Suggestion for Rehearing En Banc was denied on April 24, 1996. (Appx B.)

ii. This petition is timely filed within the prescribed ninety days from denial of the combined Petition for Rehearing, Suggestion for Rehearing En Banc, pursuant to United States Supreme Court Rule 13.4. This Court's jurisdiction is invoked under Title 28, United States Code § 1354(1).

iii. This petition was returned for correction by the United States Supreme Court on July 24, 1996 with an allowance of 60 days for correction and resubmission. (Appx C.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rules of Evidence, §608(b) Specific Instances of Conduct

Federal Rules of Evidence, §609(a) General Rule

Federal Statutes, Title 18 §1956 (a)(1)

United States Constitutional Provisions, Amendment V

United States Constitutional Provisions, Amendment VI

United States Constitutional Provisions, Amendment XIV

Pursuant to Supreme Court Rule 14.1(f), these constitutional provisions and statutes are quoted verbatim in the appendix to this Petition.

STATEMENT OF CASE

i. STATEMENT OF THE FACTS.

A Government Sting Operation began in June 1993 when Agents of the Metropolitan Bureau of Investigation in Orlando, Florida, and the Drug Enforcement Administration, began a Money Laundering Investigation (R7-125-129).

Petitioner, BERYLE JOHNSTON, was a business man from Papillion, Nebraska. He flew to Orlando on July 7, 1993 and took part in discussions with Jerry Woody and the undercover agents representing themselves to be Columbian drug cartel members of the Calli Cartel wishing to launder two (2) million dollars. Petitioner appeared willing to engage in a money laundering deal the terms of

which were never accomplished and although the Petitioner did exhibit clear signs of reluctance during the single meeting. It was Petitioner's position, throughout the trial below, that he was not a money launderer on July 7, 1993, or at any other time, and that he was not aware that he was meeting with anyone for a money laundering transaction, until he met with undercover agents representing themselves to be Cartel members. He had arrived in Orlando to initially negotiate a loan of two (2) million dollars at a favorable interest rate. (R10-27).

The Undercover Sting Operation began in June 1993 when JERRY WOODY and TERRENCE FURGUS, his partner, who was acquainted with AL PALACIO, a Confidential Informant, introduced the undercover agents to FURGUS and WOODY. Specifically, in June 1993, posing as an agent of the Calli Drug Cartel, Undercover Agent RUSSELL PERMAUL, met with JERRY WOODY and TERRENCE FURGUS, in Orlando, Florida (R7-133; 10-296). During the first meeting, Permaul told WOODY and FURGUS that the agent needed to launder Ten Million Dollars ($10,000,000) which was the proceeds of cocaine distribution (R7-157). Permaul represented himself to be a Columbian Drug Trafficker, a member of the Calli Cartel (R7-139; 10-280).

WOODY jumped at the opportunity to assist Permaul and both he and FURGUS tried to convince Permaul they were capable of laundering funds. Both WOODY and FURGUS stated that they understood the money was from cocaine proceeds but they were not interested in where the money came from (R7-157). WOODY made numerous fantastical claims to the agent in order to convince him of his money laundering abilities. He told

Permaul that for a million dollars, he could become a part of their "inner-circle" with attorneys from the Bank of Liechtenstein and that they had pilots and planes to provide transportation thereto (R8-289). WOODY explained to Permaul their method of "cleaning" the currency through foreign banks and returning the funds through a loan. He offered to launder Permaul's money for a ten percent (10%) commission and Twenty-Five Thousand Dollars ($25,000) expense money (R7-139). At the conclusion of this meeting, WOODY asked if the Undercover Agent Permaul had any funds currently in the United States that needed to be laundered. It was agreed upon between WOODY, and the Undercover Agent that Two Million Dollars ($2,000,000) in small denominations would be collected and turned over to WOODY to be laundered through WOODY's alleged banking contacts. Thus the sting thereafter focused on the laundering of Two Million Dollars ($2,000,000) in the United States. WOODY indicated that he would be in contact with Permaul in the next few days to arrange the details of this plan (R7-158).

On June 30, 1993, Undercover Agents arranged a meeting with JERRY WOODY at the Omni Hotel in Orlando, Florida. WOODY was observed accompanied by an elderly individual later identified as JOHN VELDER arriving at the Omni Hotel. VELDER remained in the lobby while WOODY proceeded to a room to meet with the Undercover Agents. WOODY then proceeded to discuss the laundering of Two Million Dollars ($2,000,000) through his contacts in Nebraska. He then suggested use of other persons to launder the money WOODY indicated that Petitioner, BERYLE JOHNSTON, could launder the

Undercover Agent's money and offer certain land parcels as collateral until the money was successfully "cleaned" (R7-201). The agents requested that the deal be made with Petitioner Johnston.

On July 7, 1993, WOODY and VELDER were followed by Undercover Agents to Orlando International Airport. At the airport, VELDER went inside the airport terminal and met with Appellant, BERYLE JOHNSTON, who had arrived on an American Airlines flight from Omaha, Nebraska (R9-108-109). VELDER and JOHNSTON then exited the terminal and entered a car driven by WOODY (R9-110).

At approximately 4:15 p.m., on July 7, 1993, WOODY, JOHNSTON and VELDER arrived at the Twin Towers Hotel, in Orlando, as instructed by the Undercover Agent (R8-243). Undercover Agents met with WOODY, JOHNSTON and VELDER in the hotel lobby. After a brief conversation, Undercover Agents invited WOODY and JOHNSTON to a hotel room. VELDER remained in the lobby. Once inside the hotel room, WOODY explained to Undercover Agents how the Two Million Dollars ($2,000,000) was going to be laundered (R8-149). After some discussions, Appellant stated:

> I see some apprehension here, and I, two million bucks is a lot of money, I understand that. And that farm probably means more to me than your two, three millions dollars means to you. Well, let's do this. I send you, or I will get to Jerry, let's not do anything today, o.k.? Because if its a problem for you – let's just not do anything. And I'll get you the legal description and you

> can type them, or you type them – you bring the form to the table . . .

(R8-262; Transcript at 26). JOHNSTON also had left the room with WOODY for what amounted to a twenty (20) minute break (R-281). In the lobby, WOODY stated to Appellant: "Beryle, this is a big drug cartel. You're not going to leave because they have men in place . . . (R10-100). JOHNSTON and WOODY then returned to the hotel room.

JOHNSTON and WOODY explained to the Undercover Agents that the Two Million Dollars ($2,000,000) could be laundered by being turned into Two Hundred ($200) and Three Hundred Dollar ($300) denomination money orders (R8-149).

At the conclusion of the meeting, WOODY, JOHNSTON and VELDER were apprehended (R8-278-279). Appellant, BERYLE JOHNSTON, advised an Undercover Agent that he was in Orlando to negotiate a six percent interest (6%) loan (R9-160-161). No money was ever shown to JOHNSTON. No money changed hands, no laundering occurred. The case against JOHNSTON was based solely on the single tape recorded meeting and conversations between JOHNSTON, WOODY and the undercover agents.

The character of Petitioner, BERYLE JOHNSTON, became an issue at trial. James W. Langley, a Papillion, Nebraska, Veterinarian, who had known Petitioner JOHNSTON for fifteen (15) years, testified that there was never a question of Petitioner's integrity or honesty in the community, and that he had intended to fly with Johnston to Orlando for the loan negotiations. Petitioner

had a good reputation for truth and veracity (R9-217-221). John Dinsdale, who also known Petitioner JOHNSTON for fifteen (15) years and purchased a bank from him, stated that "Petitioner's reputation with anybody that I have dealt with has been above approach" (R9-238). Harold Young, a Papillion, Nebraska, Real Estate Broker, who created the Fleetwood Farms Partnership with Petitioner, BERYLE JOHNSTON, testified that Petitioner had a good reputation for truth, veracity, honesty and square dealings (R9-200). The evidence presented at trial strongly suggested that Appellant JOHNSTON, a respected member of his Nebraska business community, had been set up by a cash starved mountebank named JERRY WOODY. In fact, the Government adduced no evidence at the trial below that there was any contact between BERYLE JOHNSTON and WOODY before VELDER and WOODY picked up Appellant at the Orlando Airport on July 7, 1993, except one taped conversation involving WOODY, Appellant JOHNSTON, and the agents (R8-262).

During the early part of the investigation, WOODY made numerous fantastical claims in pursuit of his Twenty Five Thousand Dollars ($25,000) in "expense money" from Permaul (R7-188, 8-231). WOODY initially stated that a plane would leave and take the money from Bogota to Liechtenstein. WOODY stated that the night before one meeting he had laundered Ten Million Dollars ($10,000,000) in Taiwan (R8-333). WOODY stated that one such plane had crashed in the past with Two and One-half Million Dollars. ($2,500,000) of gold on it, off Belize, (R7-165 & 265; R8-307; R8-320). While claiming to be a

wealthy man with access to Swiss Bank Accounts, business in the Bahamas (R8-294,299), dealings with General Noriega in Panama (R8-328), and an inter-circle of lawyers and international transportation, and being in the process of obtaining Sixty Seven Million Dollars ($67,000,000) in Italian Lire (R8-310), WOODY, the braggadocio, was apparently living off VELDER's girlfriend's credit cards (R9-165). While WOODY claimed Appellant JOHNSTON had purchased eighteen (18) 1965 Mustangs from him, this was untrue (R7-169-170; 9-35). While WOODY claimed Appellant JOHNSTON owned his own planes, Appellant arrived on a commercial flight (R9-5). WOODY emphasized to Permaul that he did not want FURGUS to know what he was doing (R7-204), and stated he could "get the Rambo People after Permaul" if necessary (R8-305).

Given the nature of WOODY's numerous fantastical claims, his constant averment "my word is my bible" should have been viewed with considerable skepticism (R7-204) by the agents conducting the investigation.

For his part, JOHN VELDER, who made the initial contact with Appellant, BERYLE JOHNSTON, and was acquitted of charges stemming from the arrest, on July 7, 1993, testified that WOODY told him that he had met some people who inherited Twenty Million Dollars ($20,000,000). VELDER was never present at the earlier meetings between WOODY, FURGUS and Permaul (R8-290). VELDER stated WOODY "couldn't afford to buy his cigarettes" (R9-289). VELDER added that "JERRY WOODY doesn't have any money. He has never had any money that I know of for the last ten (10) years." (R9-291). Even Agent Permaul conceded that WOODY

never paid for his cheap hotel rooms (R8-293; 331) drove a older model Mercedes, which was not his (R8-306), and could not pay his own telephone bill (R8-310). VELDER testified that WOODY had him contact Petitioner BERYLE JOHNSTON, rather than with Woody himself, to see whether JOHNSTON was interested in borrowing the money (R9-276; 280-281). VELDER never heard the conversations WOODY had with Permaul, and VELDER was, in fact, acquitted of charges stemming from the same Indictment as Petitioner, BERYLE JOHNSTON (R9-281).

Nothing in the investigation indicated JERRY WOODY had ever had any contact with Petitioner, BERYLE JOHNSTON, before July 7, 1993, (R8-283). However, to impeach Appellant's credibility at trial, the Government resorted to two tactics. First, it elicited testimony as to Appellant's post-arrest silence (R98-134). Second, the Government brought to the jury's attention the fact that Appellant had been previously convicted of a Misdemeanor, "making a false statement to the United States Department of Education" (R10-205-209). *See*, also, (R9-22; 9-246; 9-259). In the former, the District Court denied Appellant's motion for a mistrial (R9-157). In the latter, the District Court denied Appellant an opportunity to explain the circumstances surrounding a minor Misdemeanor (R10-209) involving a conflict of interest with a bank at which he was an Officer.

ii. Course of the Proceedings in the Court Below.

Petitioner, BERYLE JOHNSTON, was named in both counts of a two count indictment returned by the Grand

Jury in the Middle District of Florida at Orlando, on August 5, 1993.

Count I of the Indictment charges that between on and about June, 1993 and on or about July 7, 1993, in Orange County, Florida, BERYLE JOHNSTON, JERRY WOODY, TERRENCE FURGUS AND JOHN VELDER, conspired to commit money laundering in violation of 18 U.S.C. 1956(a)(3) and (2).

Count II of the Indictment charged that on or about July 7, 1993 in Orange County, Florida BERYLE JOHNSTON, JERRY WOODY AND JOHN VELDER, attempted to commit money laundering in violation of 18 U.S.C. 1956(a)(3)(B) and (2). (R1-29).

A Jury Trial proceeding as to Petitioner, BERYLE JOHNSTON, commenced on December 1, 1993 and on December 7, 1993, BERYLE JOHNSTON, was found guilty as to Counts I and II. (R2-140). On February 28, 1994, the Petitioner was sentenced to seventy eight (78) months imprisonment. (R-12). An appeal was thereinafter instituted in the 11th Circuit Court of Appeals. Appellant's Initial Brief and Reply Brief were then filed. Oral Argument was heard on February 2, 1996 and the decision of the jury and sentence imposed by the Trial Court was "Per Curiam Affirmed" on February 13, 1996 by the 11th Circuit Court of appeals. Thereafter the Petitioner filed a timely Petition for Rehearing and Suggestion of En Banc Consideration. The 11th Circuit Court of Appeals accepted the Petition as timely filed and ruled on April 24, 1996 that the Petition for rehearing be denied and the Suggestion of Rehearing En Banc be denied. Therefore the Petitioner for Writ of Certiorari herein follows.

iii. Basis for Federal Jurisdiction.

Jurisdiction before the Eleventh Circuit was invoked pursuant to 28 U.S.C. § 1291. This petition follows pursuant to 28 U.S.C. § 1254(1).

I. REASONS FOR GRANTING WRIT

It is the position of the Petitioner/Accused, BERYLE JOHNSTON, that the prosecution improperly placed evidence of his "silence" at the time of his arrest and post-arrest unfairly, improperly and in violation of his due process rights under the 5th, 6th, and 14th Amendments to the United States Constitution before the jury as evidence of Johnston's guilt.

Counsel for the prosecution, while conducting the direct examination of its witness, Special Agent Stephen Collins, directly questioned Collins on the silence of BERYLE JOHNSTON immediately after he was taken into custody and arrested by DEA Agents. (R9-134). Defense counsel immediately moved for a mistrial (R9-155). The District Court denied the mistrial motion. (R9-157). The error was further compounded by the prosecution's cross-examination of BERYLE JOHNSTON on this point and again revisited by the prosecution in its closing argument to the jury. (R9-285-286; R10-204). The error was doubly prejudicial because, given the closeness of the evidence in this Record and the questions of credibility involved, the prejudicial testimony as to Appellant's post-arrest silence may have indeed been seen by the jury as evidence of guilt.

The District Court erred in *not* granting a mistrial. This was not a case of inadvertent error by the prosecution nor mistake by the witness. The prosecution pointedly and by leading question/statement to the agent asked whether after Mr. JOHNSTON was taken into custody by the DEA Agents and they identified themselves to him, he said "Thank God, you're here". The Agent advised the prosecution in response that Mr. JOHNSTON said no such thing, in fact, he made no mention whatsoever of the laundering scheme or the drug dealers. (R9-154). The obvious purpose of this scenario of question and answer was to point out emphatically that an otherwise innocent person would certainly have made mention to the agents of the criminal nature of the meeting and would not have remained silent on this issue.

The prosecutor later cross-examined the Defendant, JOHNSTON, on this point and made significant mention of it in closing argument (R9-285-286), R10-204).

It is clear that the prosecutor's purpose and intent in focusing on the accused's silence after being taken into custody was to invite the jury to infer guilt from the silence. *United States v. Mena*, 863 F.2d 1522 (11th Cir. 1989). In *Doyle v. Ohio*, 426 U.S. 620, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the United States Supreme Court ruled that the prosecution committed reversible error by cross-examining a Defendant on his silence subsequent to his arrest and after *Miranda* warnings were read. The Court reasoned that silence in the wake of post-arrest and *Miranda* warnings may be only an exercise of an individual's constitutional right and no evidence of guilt. The Court stated:

> [2-6] Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment Rights, see *Michigan v. Tucker,* 417 U.S. 433, 443-444, 94 S.Ct. 2357, 2363-2364, 41 L.Ed.2d 182 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retain or appoint counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested . . .

The Supreme Court reiterated their holding that use of an accused person's post-arrest silence at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. See also, *United States v. Fairchild,* 505 F.2d 1378 (5th Cir. 1975).

In *United States v. Stubbs,* 944 F.2d 828, 835 (11th Cir. 1991), this Court addressed the issue of a Defendant's post-arrest silence and the proscription of cross-examining on that particular issue. This Court stated:

> [7] While a single comment alone may sometimes constitute a *Doyle* violation, the Supreme Court's opinion in *Greer* makes clear that a single mention does not automatically suffice to violate defendant's rights when the government does not specifically and expressly attempt to use, as was attempted in *Doyle* and in *Greer,* the improper comment to impeach the defendant.

> See *Lindgren v. Lane*, 925 F.2d 198, 201 (7th Cir. 1991). ("As explained in *Greer v. Miller*, it is the use of an accused's silence against him at trial by way of specific inquiry or impeachment that forms the basis for a violation of the Fourteenth Amendment."). (Emphasis added). As was the case in *Greer*, the prosecutor here "was not allowed to undertake impeachment on, or permitted to call attention to [defendant's] silence." *Greer*, 483 U.S. at 764, 107 S.Ct. at 3108 (citation omitted). The prosecution made no "specific inquiry or argument" about defendant's post-arrest silence. Id. Accordingly, we conclude there was no *Doyle* violation in the case . . .

At the time of BERYLE JOHNSTON'S arrest, he was in unfamiliar territory and in custody of Government Agents having engaged in a discussion of criminal law violations with other agents representing themselves to be dangerous drug smugglers of a Colombian Cartel. His *right* to remain silent at the time of arrest had attached. Clearly, *Miranda* warnings had not been given. But his *right* against such incrimination had attached and his silence should not have been used to draw inferences of possible guilt! In this case, the prosecution violated the Defendant's right when the prosecutor pointedly addressed the issue with Agent Collins, re-addressed the issue on cross-examination of BERYLE JOHNSTON and discussed it significantly in closing argument. The prosecution's need to effectively cross-examine a witness did not outweigh the undue prejudice and confusion which attached by focusing on the Defendant's silence at the time of arrest.

We believe the Trial Court erred in permitting the prosecution to illicit from Agent Collins the fact that Beryle Johnston remained silent and "did not say Thank God you are here" to the agents after the accused was arrested and taken into custody and agents identified themselves as law enforcement officers.

The following excerpt of Supervising Agent Collins' testimony at trial page 154 of transcript. . . .

"A. Well, the meeting is concluding and the agents are walking towards the door of the hotel room with Mr. Johnston and Mr. Woody. When the door is opened, there are several agents outside the door. We then enter the room, and actually physically take Mr. Johnston and Mr. Woody into custody.

Q. And as the agents enter the room, are you there to hear what they're saying?

A. Yes.

Q. Do these agents identify themselves?

A. Yes. As police officers. They're under arrest. They all had identifying, what we call a raid jacket. It's a wind breaker with a badge and police written across the front.

Q. And at that point, do you hear defendant Johnston indicate that, Thank God you're here to rescue me, something to that, of that vein?

A. No."

Later on page 158 of transcript Agent Collins admits he gives Johnston *Miranda* Warning after identifying

himself as a government agent within minutes in the hotel room.

"Q. Now, Special Agent Collins, subsequent to the – well, let's go back to July 7th. At some point, you actually approach the Defendant, Beryle Johnston; correct?

A. Yes, sir.

Q. And how long is that after the initial sort of entry in to the room by the other agents?

A. Not very long after. A few minutes.

Q. And what do you say to Mr. Johnston?

A. I identify myself as a special agent with D.E.A.

Q. Anything else?

A. Yes. I advised him that he was under arrest for violation of law. Money Laundering violation. I advised him of his rights.

Q. Now when you say rights, what do you mean?

A. His, what we refer to as his *Miranda* Warnings.

The attack on Johnston's silence at the point of his arrest by the prosecution we suggest is violative of Johnston's constitutional due process rights and the above questions by the prosecution to Agent Collins also violates Johnston's constitutional right to remain silent.

In *United States v. Tenorio,* 69 F.3d 1103 (11th Cir. Nov. 29, 1995) the Court held it was error for the prosecution to attack the accused on his post-arrest silence when in closing argument the prosecutor stated that an innocent courier would have given an explanation at the time of

discovery of the drugs and not have waited 22 hours after his arrest to come up with a story.

The Court determined that the prosecution failed to properly word its inquiry to cover only the time frame prior to *Miranda* warnings thereby clearly violating the dictates of *Doyle v. Ohio.* The Court reversed the conviction finding the error to be harmful.

In *Doyle v. Ohio,* 426 U.S. 620, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) this Court ruled that the prosecution committed reversible error by cross-examining a defendant on his post-arrest silence after *"Miranda"* warnings were read. We believe that it is now time for this Court to address and determine whether post-arrest silence prior to formal reading of *"Miranda"* warning should likewise be condemned as an inappropriate comment on an accused person's right to remain silent in the face of actual and physical arrest. We suggest that this issue is a significant one which has far-reaching and material implications. We would note that most recently the 11th Circuit Court of appeals addressed the issue of the prosecution's cross-examination of an accused on his silence after arrest. *United States v. Tenorio,* supra. The Court struggled with the problem of trying to determine whether the prosecutor's questions and/or statements by implication commented not only on the accused's post-arrest and pre-*Miranda* warnings silence but also on his post-*Miranda* silence. The Court concluded that the questions of the prosecution by clear implication unfairly and improperly covered the "Post-*Miranda*" time frame thereby prejudicing the accused. We suggest the time has arrived for this Court to expand *Doyle v. Ohio* doctrine to

include the post-arrest and pre-*Miranda* time frame period.

We believe the rationale laid down in *Doyle*, supra, making it a violation of due process to comment on an accused person's silence after arrest and after *"Miranda"* Warnings applies equally to an accused person's "silence" at or after arrest and prior to formal reading of one's *"Miranda"* warnings. In today's enlightened age of mass communication and television trials and television shows of police operations and arrests, i.e., "America's Most Wanted", "Hard Copy" and "COPS", is it not believable and likely that persons arrested and being taken into custody are unaware of their right and right to consult with a lawyer before saying anything to the police. We believe that there exists no fundamental reason to make a distinction between pre-*Miranda* and post-*Miranda* silence after arrest. The difficulties which arose for the 11th Circuit Court of Appeal in *Tenorio*, supra, could clearly be avoided by a ruling from this Court that one's post-arrest silence before or after formal reading of *Miranda* warnings is not a proper subject for cross-examination or comment by the prosecution.

II. REASONS FOR GRANTING WRIT

It is the position of the Petitioner/Accused, BERYLE JOHNSTON, he was entrapped into violating the law. The prosecution failed to present sufficient evidence of his "predisposition" to commit the crime of money laundering under Title 18 U.S.C. 1956 as pronounced by the Supreme Court in *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). And the Trial

Court's failure to permit the Petitioner to present evidence of a mitigating nature of the lone prior misdemeanor conviction of Beryle Johnston characterized as "Giving False Information to the Department of Education" was clear error and harmful especially in light of the significance of one's prior criminal record on the issue of "pre-disposition" to commit the crime charged.

We suggest that anytime the government through its agents or law enforcement authorities conduct what is known as a *"sting operation"* or an undercover action where government personnel portray themselves as criminals in order to induce or flush out criminal activity by others the issue of entrapment is necessarily raised. We believe the *Jacobson,* supra, decision by this Court and the later opinion of the 7th Circuit Court of Appeals in *United States v. Hollingsworth,* 27 F.3d 1196 (7th Cir 1994) stand for the belief that a defendant who raises a colorable defense of entrapment requires the government to prove beyond a reasonable doubt that the accused was in fact not entrapped and was therefore predisposed to commit the crime charged.

The entrapment defense is based on the premise that "the function of law enforcement officials . . . does not include the manufacturing of crime". *Sherman v. United States,* 356 U.S. 369, 372 (1958). Accordingly, government agents may not implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute. *Sorrells v. United States,* 287 U.S. 435, 442 (1932).

The defense of entrapment is designed to "prevent the police from turning a law abiding person into a

criminal". *United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991).

Entrapment is established *if*: (1) the defendant shows that he was induced to commit the crime; and (2) the government cannot prove, beyond a reasonable doubt, that the defendant was disposed to commit the crime prior to being approached by the government or the government's agents. *Jacobson v. United States*, supra. On the present record, there is substantial evidence of inducement presented by the government's activities. Hence, the sole issue in this case is Petitioner BERYLE JOHNSTON'S predisposition. See *Jacobson*, supra, pages 1540-41 & 42. "When government does not dispute inducement, the sole issue is whether the government carries its burden on predisposition." The burden was on the government below to establish beyond a reasonable doubt JOHNSTON'S predisposition to engage in money laundering. *Jacobson*, supra, page 1540.

In determining whether a defendant was predisposed to commit an offense, the Courts have relied on factors such as an overall assessment of the defendant's character, evidence of prior offenses, an apparent reluctance to commit the crime, and the nature of the government's inducement. *United States v. Rivera Espinoza*, 905 F.2d 156, 158 (7th Cir. 1990). The first factor here weighs heavily against the finding of a predisposition. The government presented no evidence below that JOHNSTON had ever been involved in, arrested for, or convicted of any money laundering offense. There is no question that the Government initiated negotiations to launder money. It was not even investigating JOHNSTON when the undercover

operation was initiated . . . it had no information that JOHNSTON was involved in money laundering.

Next, the government did not present sufficient evidence to support a finding that JOHNSTON was predisposed to commit money laundering. The question below was whether JOHNSTON was or was not the type of person "who, if left to his own devices, probably would never have run afoul of the law". *Hollingsworth*, 27 F.3d at 1199, quoting *Jacobson*, supra, at 1543. The inquiry is not whether JOHNSTON ultimately became an active and willing participant in any money laundering but whether he was predisposed to be involved regardless of government intervention. *Hollingsworth*, 27 F.3d at 1202. The words and behavior at the July 7 meeting – behavior that is fully documented by the government's own tape exhibits – belies Agent Permaul's testimony that JOHNSTON was easily amenable to arranging money laundering. The tapes should have raised a reasonable doubt in the mind of a rational jury concerning what JOHNSTON may have said or done. The statements do not reasonably appear to be those of an experienced money launderer who already had strong connections and who was already interested in pursuing transactions. Rather, the statements appear to be those of a confused and ambivalent person. (R9-203-205).

Facts about the July 7th conversation raise reasonable doubts concerning JOHNSTON's predisposition. First, the conversations show JOHNSTON was clearly unable or unwilling to assign his actual interest in Fleetwood Farms. But assuming arguendo JOHNSTON was viewed as ultimately becoming an active participant in money

laundering, that fact alone would not support a conclusion that he was predisposed to participate in the crime absent additional evidence of prior criminal activities of a similar nature. *United States v. Evans*, 924 F.2d 714, 716 (7th Cir. 1991), the Court stated: If Defendant "was indeed entrapped, it is irrelevant that the entrapment was so effective as to make him not only a willing but an eager participant." Court deserves a second and thorough look at the entrapment issue presented. Petitioner Johnston never laundered anything in this case. He never received anything to launder. The agents running the sting operation had no previous knowledge of Beryle Johnston. They relied upon a "super" liar totally unbelievable charlatan, Jerry Woody, to work his magic and somehow coax Johnston to come to a "one time meeting" with the undercover agents which lead to Johnston's arrest herein.

During the video taped meeting with undercover agents, Permaul and Collozzo, acting as drug cartel members and Jerry Woody, Beryle Johnston showed apparent willingness to launder proceeds although he certainly attempted to end the meeting half-way through by suggesting that each side go their own separate ways and meet later and not rush it. The agents of course proceeded onward, their goal was to make their case. Interestingly the agents as part of this operation were requiring Johnston to give them collateral (an assignment of his real estate interest) for the proceeds he was suppose to launder. Why would a cartel want an invalid assignment for an illegal venture? They certainly could not prevail in a court of law if Johnston stole or lost their money? A contract to do an illegal thing is certainly not

enforceable. Clearly, only a novice midwestern, family man, and small businessman like Beryle Johnston would not recognize the government traps. This was a preposterous and unnecessary investigation and it failed to uncover real criminal wrongdoings.

This case is of great or exceptional importance because of the need for courts to examine closely the use of government "sting" type operations to ferret out criminal activity and to fairly balance that need against the potential of ensnaring an otherwise innocent individual. We believe the Courts should be very skeptical of permitting a conviction to be upheld on a single conversation of the Petitioner's supposed intentions without the actual act.

In *United States v. Aibejeris*, 28 F.3d 97 (11th Cir. 1994) the Court concluded that it is not a precondition to conducting an investigation of the accused that the government have evidence of that person's predisposition to violate the particular law. But the Court concluded that government had to prove beyond a reasonable doubt at trial that the accused was actually predisposed to commit the underlying crime prior to its commission and absent the government's role in assisting such commission.

The Circuit Court of Appeal finding in favor of predisposition on the accused part noted that Aibejeris had been previously convicted of money laundering prior to government intervention. And also noted that there was direct testimony of government witness, Carmen Cruz, if believed was that accused had previously engaged in money laundering activity.

In Johnston's case the facts are strikingly different. He has no conviction of a crime similar to money laundering. The evidence failed to show any past criminal activity by Johnston except for the misdemeanor charge of "false statement to the Department of Education". The evidence at trial showed Johnston to be the owner of a small finance company with his son Jeff and to have a good reputation for honesty and fair dealing with the community at large. His one mistake in case was taking a plane trip to Orlando and showing up for the video taped meeting. We believe that it was clear error by the Trial Court in failing to permit the accused to present mitigating evidence surrounding his conviction for a Misdemeanor of "making a false statement to the U.S. Department of Education".

The Court in ruling that Petitioner, BERYLE JOHNSTON, would not be permitted to discuss the charge, plea agreement and/or judgment and sentence not to introduce the pertinent plea agreement and sentence documents, and to explore his overall involvement or his lack of involvement In the crime charged, relied upon Federal Rules of Evidence 608 and 609 pertaining to impeachment by prior conviction. It is suggested that Rule 609, limiting the admission of prior convictions and its details, is meant to protect the Defendant from any unfair prejudice which might arise from the submission of such evidence to a jury by the prosecution. *United States v. Barnes,* 622 F.2d 107 (5th Cir. 1980); *United States v. Carter,* 953 F.2d 1449 (5th Cir. 1992); and *United States v. Motley,* 940 F.2d 1079 (7th Cir. 1991).

Thus rule of evidence was never intended to be used to prevent a criminal defendant, whose conviction is

already before the jury through Government cross-examination, from being able to explain its circumstances in order to mitigate the effect on the jury that the Defendant's prior conviction would have.

In *United States v. Pandozzi*, 878 F.2d 1526, 1533 (11th Cir. 1989), the trial court was upheld in preventing a cross-examination into a prior conviction of a *government witness* (not the Defendant) about the fact that the prior conviction for sexual assault involved a *child* victim. The Court in so ruling, considered the fact that the prior conviction *excluding* the fact that the alleged victim of the sexual assault conviction was a child. The Court noted and considered that Rule 609(a)(1), Federal Rules of Evidence, permits the Court to exclude evidence of a witness prior conviction only if it is prejudicial to the *Defendant*, not if it is prejudicial to the witness. Therefore, clearly, this Rule is meant to protect the accused against unfair prejudice.

Also, numerous cases have permitted the prosecution to place before the jury the facts and circumstances surrounding a cooperating witness conviction and plea agreement even prior to impeachment of the witness by the defense on the theory that a party is permitted to present reasonable background information relative to a witness in order that the trier of fact get a complete picture of its witness. *United States v. Mealy*, 851 F.2d 890 (7th Cir. 1988); *United States v. Mach*, 811 F.2d 991 (7th Cir. 1987) and *United States v. Hilltop*, 772 F.2d 783, 787 (11th Cir. 1985).

Similarly, the jury in Petitioner BERYLE JOHNSTON'S case was left with the erroneous and false

impression that the prior conviction involved bank fraud, a potentially serious matter, and the Court's failure to permit rehabilitation through direct examination of Defendant, BERYLE JOHNSTON, on the circumstances of his prior conviction for a misdemeanor and the Court's failure to permit him to introduce the accompanying plea agreement, judgment and sentence was harmful error. The Court should consider that the credibility of Petitioner, BERYLE JOHNSTON, was critical to his defense herein.

Finally, the jury may have been left with the erroneous and false impression that Johnston was "predisposed" to commit the charged crimes, which prejudiced his entrapment defense. A full understanding by the jury of the circumstances of the charge and conviction would have mitigated it's effect on Johnston.

Neither the Appellant or Appellee found a case federally direct on point. We believe that this issue is of great importance in guiding future trial courts on this issue of limiting the accused to present mitigation evidence relating a prior criminal conviction placed before the jury by the prosecution. We believe in this case that the trial court abused its discretion especially in light of the entrapment defense presented to the jury and jury instructions thereon regarding predisposition.

CONCLUSION

In conclusion, the Petitioner respectfully requests that this Honorable Court accept jurisdiction of his cause and the issues stated herein. It is our belief that the

Petitioner has been denied due process of law by the prosecution's attack on the Petitioner's post-arrest silence as evidences of his guilt and for failure of the prosecution to prove beyond a reasonable doubt by competent evidence that the Petitioner was predisposed to commit the crimes charged. We request that this Court reverse the conviction and remand for a new trial.

Respectfully submitted, this 20th day of September, 1996.

F. Wesley Blankner, Jr., Esq.
217 E. Ivanhoe Blvd., North
Orlando, Florida 32804
(407) 894-0341
Fl. Bar No.: 241784
Attorney for the Petitioner

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-2273
Non-Argument Calendar

D. C. Docket No. 93-130-CR-ORL-22

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERYLE JOHNSTON;
JERRY WOODY,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(Filed February 13, 1996)

Before ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Circuit Rule 36-1.

Judgment Entered: February 13, 1996
For the Court: Miguel J. Cortez,
Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 5/7/96

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-2273

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERYLE JOHNSTON;
JERRY WOODY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed April 24, 1996)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson III
UNITED STATES CIRCUIT JUDGE

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

July 24, 1996

F. Wesley Blankner Jr.
217 East Ivanhoe Blvd. North
Orlando, FL 32804-6486

RE: Johnston v. United States

Dear Mr. Blankner:

The above-entitled petition for writ of certiorari was received July 24, 1996. The papers are returned for the following reason(s):

No motion for leave to proceed in forma pauperis, signed by the petitioner or by counsel, is attached. Rules 33.2 and 39. The motion must be signed.

No notarized affidavit or declaration of indigency is attached. Rule 39. You may use the enclosed form.

The petition fails to comply with the content requirements of Rule 14, in that the petition does not contain:

The questions presented for review. Rule 14.1(a).

Please correct and resubmit as soon as possible. Unless the petition is received by this Office in corrected form within 60 days of the date of this letter; the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

You must provide an original and 10 copies of your petition for a writ of certiorari and motion for leave to proceed in forma pauperis. Rule 12.2.

Sincerely,
William K. Suter, Clerk
By: /s/ Troy D. Cahill
Troy D. Cahill
(202) 479-3044

Enclosures

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL RULES OF EVIDENCE
§608(b) Specific instances of conduct.

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FEDERAL RULES OF EVIDENCE

§609(a) General rule.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

FEDERAL STATUTES

Title 18 §1956- (a)(1)

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(3) Whoever, with the intent –

> (A) to promote the carrying on of specified unlawful activity;
>
> (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
>
> (C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph, the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

U.S. CONSTITUTIONAL PROVISIONS

5th AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTIONAL PROVISIONS

6th AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State or district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

U.S. CONSTITUTIONAL PROVISIONS

14th AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.